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No. 94-

In The

Supreme Court of the United States

October Term, 1994

TAMPA CROWN DISTRIBUTORS, INC.,

Petitioner,

vs.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION; AND OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Respondent.

Petition For Writ Of Certiorari To The District Court Of Appeal First District, State Of Florida

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does United States Supreme Court Rule 12.4, consistent with its plain language, afford party status in this Court to "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed"?

PARTIES TO THE PROCEEDING BELOW

In addition to the parties whose names appear on the caption to this petition, the parties to the proceeding in the court whose judgment is sought to be reviewed were McKesson Corporation, Florida West Coast Beverage Distributors, Inc., and Grantham Distributing Company. Pursuant to Rule 12.4, Tampa Crown has notified the Clerk of this Court, in writing, of its belief that these parties have no interest in the outcome of this petition. This notice has been served on these parties, as Rule 12.4 requires.

Tampa Crown Distributors, Inc., has no parent company or subsidiaries.

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R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* (7th ed. 1993) 7, 15

OPINION BELOW

The opinion of the Florida District Court of Appeal, First District, is reproduced at App. 1-10.

STATEMENT OF JURISDICTION

The Florida District Court of Appeal, First District, ruled on September 7, 1994, (App. 1-10) that under United States Supreme Court Rule 12, Tampa Crown Distributors, Inc., was not considered a party to this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), and, therefore, was not entitled to a retroactive remedy for the constitutional injury it has suffered. Tampa Crown's Petition for Rehearing, asking the court to reconsider its construction of United States Supreme Court Rule 12 and to afford Tampa Crown a constitutional remedy, was denied on October 31, 1994. App. 11. No review is available in the Florida Supreme Court. See Florida Rule of Appellate Procedure 9.030(a). On January 19, 1995, Justice Kennedy granted petitioner's motion to extend the time for filing a Petition for a Writ of Certiorari to March 1, 1995. App. 13.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, as this case involves a right to a remedy claimed under the United States Constitution and construction of a United States Supreme Court Rule.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]o State

shall * * * deprive any person of life, liberty, or property, without due process of law."

United States Supreme Court Rule 12 provides, in pertinent part:

> 2. Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party who is not shown on the petition for a writ of certiorari to have joined therein at the time the petition is filed with the Clerk may not thereafter join in that petition. When two or more cases are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the cases will suffice. A petition for a writ of certiorari shall not be joined with any other pleading.
>
> * * *
>
> 4. All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of the notice shall be served as required by Rule 29 on all parties to the proceeding below. A party noted as no longer interested may remain a party by promptly notifying the Clerk, with service on the other parties, of an intention to remain a party. All parties other than petitioner shall be respondents, but any respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for

the petitioner, except that a response to the petition shall be filed within 20 days after its receipt, and the time may not be extended.

STATEMENT OF THE CASE

Tampa Crown Distributors, Inc., is a Florida liquor distributor which, since 1987, has been seeking a remedy for the unconstitutionally discriminatory taxing scheme that it was subjected to in Florida. In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), this Court ruled that Florida must afford such a remedy to those who were injured by this taxing scheme. Under this Court's Rules, Tampa Crown was a party to that very case. Nonetheless, because of a misinterpretation of this Court's rules, the Florida courts have denied Tampa Crown its right to a remedy.

A. The Initial State Court Proceedings

The efforts of Tampa Crown and McKesson to obtain relief from Florida's discriminatory taxing scheme began in 1987, when both Tampa Crown and McKesson (and some other distributors) filed actions in the Circuit Court for Leon County, Florida. Following Motions for Summary Judgment filed by Tampa Crown and McKesson, the trial court held the Florida statutes unconstitutional because they created a preferential tax rate for alcoholic beverages manufactured from agricultural products grown in Florida. The trial court held that its ruling was to be applied on a prospective basis only, however, and

refused to afford either distributor any backward-looking relief.

Both sides appealed. On one side, the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, asked the Court of Appeal to reverse the finding that the statutes were unconstitutional. On the other side, Tampa Crown and McKesson asked the Court of Appeal to provide retrospective relief for the injury they suffered. The Florida Court of Appeal consolidated the cases and certified the cause to the Florida Supreme Court as involving a question of great public importance requiring immediate resolution.

On February 18, 1988, the Florida Supreme Court issued its judgment and opinion in the consolidated case. *Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, and Office of the Comptroller, State of Florida, et al. v. McKesson Corporation, et al.*, 524 So.2d 1000 (1988). The court affirmed the trial court's holding that the statutes were unconstitutional, holding that "the tax scheme at issue places a clear discriminatory burden on interstate commerce which the state has failed to justify in terms of legitimate local benefits other than the admitted benefits to local industry flowing from the statute." *Id.* at 100. The court then ruled that the trial court had not erred in "giving its ruling prospective effect and thereby denying cross-appellants McKesson and Tampa Crown a refund." *Id.*

B. Review In This Court

This Court issued a writ of certiorari to the Florida Supreme Court and, in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), this Court reversed the judgment of that court. This Court held that "if a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 31. The party that filed the petition for certiorari in that case was McKesson Corporation; as we will demonstrate, however, each of the parties to the Florida Supreme Court's decision was also deemed a party to this Court's decision by virtue of this Court's Rule 12.4.

C. Subsequent State Court Proceedings

On remand from this Court, the Florida Supreme Court in turn remanded the case to the trial court. See *Division of Alcoholic Beverages and Tobacco, et al. v. McKesson Corp., et al.*, 574 So.2d 114 (Fla. 1991). On remand, the Division proposed to comply with the judgment of this Court by remedying the discrimination through retroactive assessment of back taxes on those who had received preferential tax treatment. When Tampa Crown filed its opposition to this proposal in the trial court, the Division argued that Tampa Crown was ineligible to participate in the remand because it had not affirmatively joined in the Petition for Certiorari that

McKesson had filed in this Court. The trial court rejected this contention and recognized Tampa Crown's status as an appropriate party to the action. The trial court also ruled that the Division's proposed remedy for the unconstitutional taxing scheme was inadequate.

The Division appealed to Florida's First District Court of Appeal and Tampa Crown cross-appealed. While these appeals were pending, the Division settled all issues with McKesson Corporation through a settlement agreement which provided for the payment of a $21 million refund to McKesson. The appeal went forward against Tampa Crown alone, and on September 7, 1994, the District Court of Appeal issued its ruling in the case.

D. The Decision Of The Florida Court Of Appeal

The Florida court recognized that Tampa Crown's right to continue as a party in this action turned on whether it was properly a party to this Court's decision in *McKesson*. The Florida court also recognized that United States Supreme Court Rule 12.4 supports Tampa Crown's position. That rule provides:

> All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner shall notify the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition.

Supreme Court Rule 12.4.

Nonetheless, the Florida Court thought there was some tension between Rule 12.4 and Rule 12.2 which

provides that parties who are "interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition." According to the Florida court, "the instant case appears to fall somewhere between the two rules." App. 5. The court recognized that the case involves "one proceeding and one judgment in the Florida Supreme Court (*McKesson I*), hence implying the applicability of rule 12.4." *Id.* at 6. But the court also believed that Rule 12.2 might apply because the case was a consolidated one.

Ultimately, the court resolved this issue against Tampa Crown, holding that "although rule 12.4 offers superficial support to Tampa Crown's position, we nevertheless conclude that Tampa Crown was required to take some affirmative act before the United States Supreme Court in order for its refund request to survive." *Id.* at 7. Referring to the leading treatise on Supreme Court practice, the court acknowledged the treatise's assertion that under Rule 12.4 "any party before an inferior tribunal is automatically made a party before the Supreme Court without the necessity of such party filing any motion to be named or added as a party." *Id.* at 7 (quoting R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice*, § 6.20 (7th ed. 1993)). But the Florida court found it significant that the treatise recommends that a party who is not named in a petition "should notify the clerk and any other parties that he or she has an interest in the outcome of the case and intends to participate as a party under rule 12.4." *Id.* at 6-7.

The Florida court also found it significant that it could identify several cases in which a litigant who was

deemed a party to a Supreme Court case under Rule 12.4 had chosen to file its own set of briefs before this Court. Unlike those parties who filed briefs in this Court, the Florida court noted that

> Tampa Crown has not contended that it * * * did anything before the Supreme Court, such as filing a notice to assert its continuing interest, or a brief in support of McKesson's position. Finally, nothing in *McKesson II* discloses that Tampa Crown was either a petitioner or a respondent, and its attorney is not referenced. Under the circumstances, we conclude that Tampa Crown has failed to establish that it was a party before the Supreme Court in *McKesson II*, and, therefore, it has no entitlement to any of the possible avenues of relief which the Court outlined therein.

Id. at 8.

The Florida Court of Appeal denied Tampa Crown's Petition for Rehearing on October 31, 1994. App. 11. No review of this matter is available in the Florida Supreme Court. See Florida Rule of Appellate Procedure 9.030(a). On January 19, 1995, Justice Kennedy extended the time for filing a Petition for Writ of Certiorari to March 1, 1995. App. 13.

REASONS FOR GRANTING THE WRIT

Tampa Crown followed this Court's rules. Those rules clearly and unambiguously told Tampa Crown that it need not take any affirmative steps in order to be treated as a party to this Court's review of the Florida

Supreme Court judgment to which Tampa Crown and McKesson were parties. Yet, Tampa Crown is now being told that it has lost its right to relief (potentially totalling in the many millions of dollars) because it did not go beyond this Court's rules and file papers with this Court indicating that it wished to be considered a party to McKesson's petition and this Court's grant of certiorari. The unfairness of this result is manifest. Tampa Crown respectfully submits that this Court has a special responsibility to undertake review when the Court's own rules are misconstrued in this manner and when a party is punished for following this Court's rules to a tee.

This Court should grant certiorari in this case not only to remedy this injustice to Tampa Crown, but to settle a conflict among lower courts on the correct interpretation of Rule 12.4. The result that the Florida court reached in this case is consistent with the decisions of two federal circuit courts of appeals. It is inconsistent, however, with many decisions of this Court and a decision of another federal circuit. A grant of certiorari in this case can serve to settle the disagreement and confusion among lower courts and to offer clear guidance to parties as to what this Court's rules demand of them.

A. Rule 12.4 Is Unambiguous.

United States Supreme Court Rule 12.4 provides:

> All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the

> parties below has no interest in the outcome of the petition. A copy of the notice shall be served as required by Rule 29 on all parties to the proceeding below. A party noted as no longer interested may remain a party by promptly notifying the Clerk, with service on the other parties, of an intention to remain a party.

The default rule that this provision sets forth is plain. The rule assumes that, unless the Court is notified, "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed" intend to join with the party who is seeking review of that judgment. Only in one scenario does the Rule require a party to affirmatively apprise the Court of its desire to remain a party in the case: if the petitioning party notifies the Clerk of the Court, in writing, of "its belief that one or more of the parties below has no interest in the outcome of the petition," then the party whose lack of interest has been reported to the Court must take affirmative steps if it wishes to remain a party to the action.[1]

There is no doubt that under this Rule, Tampa Crown was a party to this Court's decision in *McKesson*. First, it was most definitely a party to the "proceedings in the court whose judgment is sought to be reviewed." The Florida Supreme Court issued one opinion and one judgment in its 1988 decision, and Tampa Crown was one of the two parties appealing to that court from the trial court's denial of prospective relief. Second, the petitioner – McKesson Corp. – did not notify the "Clerk of this Court in writing of the petitioner's belief that [Tampa

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[1] For labelling purposes, Rule 12.4 provides that any party other than the petitioner who files for certiorari shall be called a respondent.

Crown] had no interest in the outcome of the petition." Hence, Tampa Crown was deemed a party to the case without any need of it "notifying the Clerk, with service on the other parties, of an intention to remain a party."

The plain meaning of this language admits of only one result and provides the only tool necessary for interpreting this Rule. As this Court has put it in construing the rules:

> We do not have before us a choice between a "liberal" approach toward [a Rule], on the one hand, and a "technical" interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what is says.

Schiavone v. Fortune, 477 U.S. 21, 30 (1986); see generally *Brown v. Gardner*, 115 S. Ct. 552, 555 (1994) ("the text and reasonable inferences from it give a clear answer" and "that is the end of the matter"); *United States v. Locke*, 471 U.S. 84, 95 (1985) (strictly construing statutory deadline requiring filing *before* December 31, because "there is a basic difference between filling a gap left by * * * silence and rewriting rules").

B. There Is No Tension Between Rule 12.4 And Rule 12.2.

Notwithstanding the clear language of Rule 12.2, the Florida court believed that there was some confusion as to how Rule 12.4 relates to Rule 12.2. Rule 12.2 provides:

> Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ

> of certiorari; or any two or more may join in a petition. A party who is not shown on the petition for a writ of certiorari to have joined therein at the time the petition is filed with the Clerk may not thereafter join in that petition. * * *

There is no tension between Rule 12.2 and 12.4. Rule 12.2 tells multiple parties what they *are permitted to do* in seeking review of a judgment: they "may", if they wish, "petition separately for a writ of certiorari;" or, they "may", if they wish, "join in a petition" and have all of their names associated with the request for this Court's review. Moreover, Rule 12.2 states that a party who wishes to have its name appear on a petition for certiorari, must do so at the time the petition is filed, and may not come in at a later date and attach its name to a petition.

Nothing in Rule 12.2's description of the petition for certiorari speaks to the issue addressed in Rule 12.4, however. Rule 12.4 speaks to the case – like this one – in which a party is not concerned with adding its voice to the petition for certiorari, but nonetheless wishes to ensure that it will be treated as a party in this Court. The Rule could easily be drafted to require such a party to file a piece of paper adopting the arguments that the other party has filed. But the rule is not drafted that way. Instead, Rule 12.4 tells that party that it need not burden the Court with a "me-too" filing. It tells that party that it is entitled to rely on Rule 12.4's assurance that the non-petitioning party to the proceeding below will be treated as a party in the Supreme Court, unless the Court is otherwise notified.

This Rule is quite different from rules that govern other forms of review in the federal system. Federal Rule of Appellate Procedure 3(b), for example, explicitly provides that "[i]f two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal * * * ." This court has applied the text of Rule 3 literally and has held that a litigant may not be party to an appeal unless she complies with the rule and files a Notice of Appeal with her name on it. See *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). The Court should similarly be faithful to the very different text of Supreme Court Rule 12.4, which does not require a litigant to take any such affirmative step in order to maintain the status of a party.[2]

C. This Court's Decisions Demonstrate That Rule 12.4 Means What It Says.

This Court's decisions demonstrate the vitality of the principle that a party to a proceeding is automatically

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[2] The Florida court confused these two rules when it found *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980), "particularly instructive." App. 8. The reason that this Court refused to consider one of the claims of the Department of Public Welfare in *O'Bannon* had nothing to do with Rule 12.4 and the Department's status as a party in *the Supreme Court*. It turned on the fact that the Department had not preserved the issue in question by appealing that issue from the *District Court* to the *Court of Appeals*. Thus, the Court held that the petition for certiorari "could not revive the issue" that had already been waived. *O'Bannon*, 447 U.S. at 783 n.14.

deemed a party to review in this court, unless the Court is told otherwise. In *Rake v. Wade*, 113 S.Ct. 2187 (1993), for example, there had been three parties to a consolidated case in the lower courts. Only two of them joined in the petition for certiorari, but this Court explained that the third party was also a party to the case under the workings of Rule 12.4. See *Id.* at 2189 n.1. Many other decisions of this Court similarly apply the dictates of Rule 12.4, or its identical predecessor, Rule 19.6. See *e.g.*, *Metropolitan Washington Airports Authority v. Citizens For Abatement Of Aircraft Noise*, 501 U.S. 252, 263 (1991) (United States was automatically a party in the Supreme Court "pursuant to this Court's Rule 12.4"); *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 303 (1983) (noting that under the rule, a "party below is a party in this Court by virtue of his being a party in the proceedings below").[3]

The Florida court noted that in several of these cases, the party who was entitled to this "automatic party" status *chose* to file some pleadings in this Court in the

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[3] This Court's decision in *Diamond v. Charles*, 476 U.S. 54 (1986), does not call this proposition into question. In *Diamond*, the Court dismissed an appeal because the only parties to actively appeal to this Court lacked standing to challenge the lower court's ruling. The Court recognized that the State of Illinois enjoyed automatic party status under the Court's rules, but held that this non-participating-party status is not sufficient to confer jurisdiction on this Court if the actively participating party has no case or controversy to litigate. *Id.* at 63, 64. No such issue arises in the case of Tampa Crown; McKesson Corporation had clear standing in *McKesson*, and Tampa Crown's active participation was not necessary to create a justiciable controversy in this Court.

course of the case. See App. 7-8 (citing cases). But this observation is of no significance to the question of whether those parties had a *duty* to file anything in order to secure their status as parties. Nothing in any of this Court's decisions even hints at such a requirement, and the Rules of this Court are explicitly to the contrary.

Ironically, the very treatise that the Florida court relied upon in reaching its decision squarely supports the opposite result. The relevant chapter of *Supreme Court Practice* explains that, under Rule 12.4, "any party to the proceeding in the court below whose judgment is sought to be reviewed is automatically a party to the proceedings in the Supreme Court, if that party so desires despite the failure to name that party in the petition. *An unnamed party has the status of a litigant in the Supreme Court by operation of Rule 12.4, without the necessity of filing any kind of motion to be added or named as a party.*" R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice*, §6.20, at 323-324 (7th ed. 1993) (emphasis added).

Instead of relying on this plain and accurate description of the law, the Florida court focused on the treatise's practice tip that "while Rule 12.4 does not so provide" it is wise to notify the Clerk of a party's intention to remain a party, "even in situations where the petitioner has failed to suggest no interest in the outcome." *Id.* at 324. Without questioning the prudence of this practical tip,[4] it must be

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[4] The tip is surely helpful to the litigant with automatic party status who wishes to actively monitor the proceedings in this Court with an eye toward possibly filing something of its own if it considers itself inadequately represented by the actively participating party.

noted that to turn this advice into law, as the Florida court did, is to make Rule 12.4 entirely superfluous. The whole point of that Rule is to assure a party that it need not apprise the Clerk of its intention to remain a party except under certain specified circumstances. Tampa Crown cannot be faulted for taking this Court's rules on their words.

D. Interpretation Of Rule 12.4 Has Caused Confusion In The Lower Courts.

The Florida court is not alone in failing to recognize the significance of Rule 12.4's automatic party provision. In *Local 322, Allied Industrial Workers of America v. Johnson Controls, Inc.*, 969 F.2d 290, 293 (7th Cir. 1992), the Court of Appeals for the Seventh Circuit suggested that a party to a proceeding below must take affirmative steps in order to secure its status as a party before the Supreme Court. Similarly, in *United States v. Tippett*, 975 F.2d 713 (10th Cir. 1992), the court all but ignored the terms of Rule 12.4 and held that for an individual to be a party in this Court "his name had to be on the petition filed by [the party that filed] to have his case reviewed by the Supreme Court." *Id.* at 719.

By contrast, the Third Circuit has recognized the true scope of Rule 12.4. In *Provident Tradesmen Bank and Trust Co. v. Lumbermen's Mutual Casualty Co.*, 411 F.2d 88 (3d Cir. 1968), the court dealt with a situation where only one of several parties to an earlier appellate court decision had filed a petition for certiorari in this Court. After this Court reversed the earlier appellate ruling, other parties to that earlier ruling sought to claim the benefit of this

Court's reversal. The Third Circuit held that they were entitled to do so. Quoting the language of Rule 12.4 (which was then codified as Rule 21(6)), the Third Circuit explained that "[u]nder this rule a petition for certiorari by one party is presumptively for the benefit of all other parties." *Id.* at 98.

Given the Rules of Appellate Procedure under which Courts of Appeals operate (see *supra* p. 13), it is not difficult to understand why some courts have not grasped the import of Rule 12.4 and the concept of automatic party status in this Court. It is clear, though, that Rule 12.4 does create just such status.

* * *

There are, no doubt, strong policy reasons that counsel in favor of Rule 12.4 and strong policy reasons that counsel against it. On the one hand, the rule makes a presumption that is consistent with the overwhelming majority of cases – parties to a proceeding below would generally be expected to wish to participate in its review. Given this presumption, Rule 12.4 obviates the need for such parties to clutter the case file by filing "skeletal brief[s]" adopting another party's brief "as if copied in extenso." *Omni Capital International*, 484 U.S. at 99 n.2. On the other hand, there are many arguments in favor of requiring a litigant to take some action in the Supreme Court if the litigant wishes to be considered a party to a proceeding in this Court. These competing policies are surely relevant to a decision about whether Rule 12.4 should be amended. They have no relevance, however, to assessing the propriety of the Florida court's decision in this case, or the need for this Court to review this case.

Unless and until Rule 12.4 is amended, parties like Tampa Crown have the right to rely on its plain language which extends automatic party status to certain parties without requiring the filing of papers in this Court. It is fundamentally unfair to lull a party into complacency by virtue of a rule, and then allow the party to be deprived of its right to a constitutionally adequate remedy because some lower courts might not think the rule wise. Only this Court is in the position to clarify the meaning of its rules and only this Court is in the position of ensuring that Tampa Crown will not be punished for doing exactly what this Court's rules prompted it to do.

CONCLUSION

For the reasons stated, Tampa Crown respectfully requests that this Court grant the petition for a writ of certiorari. In the alternative, should the Court conclude that the nature of this matter is such that it does not require plenary consideration, Tampa Crown respectfully asks that the Court summarily reverse the judgment below and declare that Rule 12.4 means just what it says.

Respectfully submitted,

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MARCH 1, 1995

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, Department of Business Regulation; and Office of the Comptroller, State of Florida,

Appellants/
Cross-Appellees,

v.

McKESSON CORPORATION; Florida West Coast Beverage Distributors, Inc.; Grantham Distributing Company, Inc.; and Tampa Crown Distributors, Inc.,

Appellees/
Cross-Appellants.

Opinion filed September 7, 1994.

An appeal from the Circuit Court for Leon County. P. Kevin Davey, Judge.

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Stephen Turner of Broad & Cassel, J. Riley Davis, Gary R. Rutledge and Paul Ezatoff of Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, Tallahassee, James L. Chase of James L. Chase, P.A., Richard A. Arnold and Scott E. Perwin of Kenny, Nachwalter, Seymour & Arnold, Pensacola, John D. Beasley of Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, John McNeel Breckenridge, Jr. of The Breckenridge Group, Tampa, Geoffrey Todd Hodges and Gregory P. Hansel of Shackleford, Farrior, Stallings & Evans, P.A., Tampa, for Florida West Coast Beverage Distributors, Inc. Michael P. McMahon and Virginia B. Townes of Akerman Senterfitt & Eidson, P.A., Orlando for Grantham Distributing Co., Inc. Harold F.X. Purnell of Rutledge, Ecenia, Underwood and Purnell, P.A., Tallahassee, for Tampa Crown Distributors, Inc., for appellees/cross-appellants.

ERVIN.

Although numerous issues have been raised in this appeal, we conclude that as a result of agreements entered between appellant, the Division of Alcoholic Beverages and Tobacco, and various appellees, the only issue now requiring resolution is whether appellee Tampa Crown Distributors, Inc., retains standing as a party to this appeal. Having decided that Tampa Crown has no interest remaining in the present litigation, we reverse the trial court's order granting partial summary judgment in Tampa Crown's favor and remand with directions that judgment be entered for the Division.

The history of this case is well documented in the numerous published opinions, to wit: *Division of Alcoholic*

Beverages & Tobacco v. McKesson Corp., 524 So.2d 1000 (Fla. 1988) (*McKesson* I); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990) (*McKesson* II); and *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 574 So.2d 114 (Fla. 1991) (*McKesson III*). Consequently, this opinion summarizes only those facts necessary to our decision in the present appeal.

McKesson Corporation and Tampa Crown Distributors, licensed wholesale distributors of alcoholic beverages in Florida, separately challenged sections 564.06 and 565.12, Florida Statutes (1985), providing for preferential tax treatment to domestic distributors of alcoholic beverages manufactured from products grown in Florida. The trial court entered final and partial summary judgments in favor of Tampa Crown and McKesson, respectively, invalidating the discriminatory taxing scheme on Commerce Clause grounds, but made its rulings prospective in nature, causing it to deny the distributors' tax refund requests. The Division appealed the Commerce Clause rulings, and Tampa Crown and McKesson cross-appealed the prospective application rulings. This court consolidated the two cases and certified the case to the Florida Supreme Court, which affirmed the trial court's rulings in *McKesson I*.

McKesson alone filed a petition for writ of certiorari in the United States Supreme Court, which agreed that the taxing scheme violated the Commerce Clause, but struck that portion of *McKesson I* which had granted only prospective relief. In order to provide McKesson with a clear and certain remedy for the past discrimination, the Court suggested the following three remedies: that the

state refund McKesson the difference between the tax it had paid and the tax it would have paid had it received the preferential tax rate; that it assess and collect back taxes from McKesson's competitors which had benefited from the rate reductions; and, finally, that it consider a combination of a partial refund to McKesson and a partial retroactive assessment of tax increases on the favored competitors. *McKesson II.*

Following remand of the case to the Florida Supreme Court, the Division announced that it proposed to assess back taxes against all distributors which had received preferential tax treatment. The court thereupon remanded the case to the trial court to determine whether the chosen remedy satisfied minimum constitutional requirements. *McKesson III.* Thereafter the Division implemented its policy decision by adopting emergency rules outlining the procedure for retroactively assessing and collecting taxes from McKesson's competitors which had benefited from the unconstitutional tax scheme. See 17 Fla.Admin. Weekly 1626-28 (Apr. 12, 1991) (Emergency Rules 7AER91-8 to 10). Tampa Crown filed a petition before the trial court on remand, seeking to appear in the proceeding on the ground that it was a party and would be substantially affected by the outcome. The Division opposed the petition, arguing that only those distributors which had retroactive tax assessments entered against them had standing to intervene, and that Tampa Crown, neither having sold any of the preferred products, nor assessed against it any back tax and seeking only a refund, lacked intervenor status. Additionally, the Division asserted that because Tampa Crown had not pursued an appeal to the United States Supreme Court, as had

McKesson, *McKesson I* was res judicata insofar as Tampa Crown's claim for relief. Tampa Crown answered that it was clearly affected, because it was one of the parties that had been wrongfully discriminated against, and it was entitled, as was McKesson, to a clear and certain remedy. The trial court granted Tampa Crown's petition and allowed it to appear for the limited purpose, within the confines of the Supreme Court's mandate, of presenting argument against the remedy chosen by the state. The question now before us concerns the propriety of the lower court's ruling.

Tampa Crown contends that it has standing based on United States Supreme Court Rule 12.4 (formerly known as rule 19.6). This rule, involving certiorari review, provides:

> All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner shall notify the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition.

Initially, we question whether the above rule applies or whether rule 12.2, formerly known as rule 19.4, is applicable. Rule 12.2 states that parties who are "interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition." As explained in *Supreme Court Practice* § 6.22 (7th ed. 1993), by Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, rule 12.2 is implicated once cases have been consolidated. The instant case appears to fall somewhere between the two rules; it involves separate suits and

judgments brought in the trial court, which were thereafter consolidated in the appellate court, thereby suggesting the application of rule 12.2. The case also involves one proceeding and one judgment in the Florida Supreme Court (*McKesson I*), hence implying the applicability of rule 12.4. If we were to apply the provisions of rule 12.2 to the instant case, Tampa Crown could not be deemed a party to the case filed in the United States Supreme Court, as it neither filed its own petition nor joined in McKesson's petition before the Court. As a result, it could not be considered a party to *McKesson II*, or *McKesson III* for that matter, and the decision in *McKesson I* holding the statutory taxing scheme unconstitutional, but making the decision prospective in its application, must be considered res judicata as to the rights of Tampa Crown. Thus, the resolution to the issue of Tampa Crown's standing to seek a refund turns on the applicability of rule 12.4.

Although rule 12.4 offers superficial support to Tampa Crown's position, we nevertheless conclude that Tampa Crown was required to take some affirmative act before the United States Supreme Court in order for its refund request to survive. Section 6.20 of *Supreme Court Practice* explains that rule 12.4 is applicable once the petitioner fails, either intentionally or accidentally, to name a party who was involved in the proceeding below and who still retains an interest in the case. Under this rule, any party before an inferior tribunal is automatically made a party before the Supreme Court without the necessity of such party filing any motion to be named or added as a party. The authors point out, however, that the party should notify the clerk and any other parties that he or she has an interest in the outcome of the case and

intends to participate as a party under rule 12.4. Although the rule provides that the unnamed party is assigned the role of respondent, regardless of that party's interest, he or she is free to file a response or brief appropriate to his or her position.

We have found no cases directly on point; however, after reviewing several of the cases cited in *Supreme Court Practice,* we conclude that even if Tampa Crown were automatically made a party under rule 12.4, in order for its claim for relief to prevail, Tampa Crown was required to take further action in the Supreme Court, by filing either a notice informing the clerk of its continuing interest in the case or a brief adopting McKesson's brief. See Stern, Gressman, Shapiro & Geller, *Supreme Court Practices* § 6.20 (7th ed. 1993). For example, in *Director, Office of Workers' Compensation Programs v. Perini North River Associates,* 459 U.S. 297, 304 n. 12, 103 S.Ct. 634, 640 n. 12, 74 L.Ed.2d 465, 472 n. 12 (1983), the party that was made a respondent by virtue of rule 12.4 demonstrated its continued stake in the outcome by filing in support of the petitioner at both the certiorari and merit stages of the proceedings. In *Washington v. Davis,* 426 U.S. 229, 237 n. 7, 96 S.Ct. 2040, 2046 n. 7, 48 L.Ed.2d 597, 606 n. 7 (1976), the party named respondent filed a brief pursuant to rule 12.4, and in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.,* 501 U.S. 252, ___ & n. 12, 111 S.Ct. 2298, 2305 & n. 12, 115 L.Ed.2d 236, 251 & n. 12 (1991), the party designated a respondent under rule 12.4 filed a brief arguing its position. Similarly, in *Mullins Coal Co., Inc. of Virginia v. Director, Office of Workers' Compensation Programs,* 484 U.S. 135, 140 n. 8, 108 S.Ct. 427, 430-31 n. 8, 98 L.Ed.2d 450, 458-59 n. 8

(1987), both an employee and his employer appeared before the United States Supreme Court as respondents pursuant to rule 19.6, and each actively participated, albeit on opposing sides.

Tampa Crown has not contended that it filed a petition with the United States Supreme Court or that it joined in McKesson's petition. Nor has it asserted that it did anything before the Supreme Court, such as filing a notice to assert its continuing interest, or a brief in support of McKesson's position. Finally, nothing in *McKesson II* discloses that Tampa Crown was either a petitioner or a respondent, and its attorney is not referenced. Under the circumstances, we conclude that Tampa Crown has failed to establish that it was a party before the Supreme Court in *McKesson II*, and, therefore, it has no entitlement to any of the possible avenues of relief which the Court outlined therein.

On this point, we found *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980), particularly instructive. That case involved the decertification of a nursing home as a provider under certain Medicare/Medicaid agreements with the Department of Housing, Education and Welfare (HEW) and the Pennsylvania Department of Public Works (DPW). The nursing home and six Medicaid patients thereafter filed an action in district court, claiming that they were entitled to an evidentiary hearing on the merits of the decertification before the Medicaid payments could be stopped. The proceedings culminated with an order in which, among other things, the court dissolved an injunction which had required HEW and DPW to continue the payments; however, HEW and DPW were required to pay

for services which had actually been provided to the patients. The nursing home and patients appealed portions of the order adverse to them, while HEW cross-appealed that part requiring HEW and DPW to pay for actual services rendered. Although DPW was named as an appellee, it failed to take any action in the appeal. The Court of Appeals reversed that part of the order dissolving the injunction, thereby requiring HEW and DPW to continue paying Medicaid benefits until the patients were granted a hearing, and it affirmed that portion directing HEW and DPW to pay for the actual services provided. DPW then filed a petition for certiorari to the United States Supreme Court. In footnote 14, the Court explained that because DPW did not cross-appeal the district court's ruling requiring it to make payments for actual services provided to the patients, it effectively accepted the court's directive. DPW's petition for certiorari, therefore, could not revive the issue of the propriety of that portion of the order. *Id.* at 783 n. 14, 100 S.Ct. at 2474 n. 14, 65 L.Ed.2d at 516-17 n. 14.

An analogy from the above case can be made to the facts in the instant case. Because Tampa Crown did not seek review in the United States Supreme Court of the Florida Supreme Court's decision making its rulings prospective, Tampa Crown must be considered to have accepted that decision and, therefore, to have no interest in any remaining litigation. As a consequence, the decision in *McKesson I*, which denied the distributors' refund requests by virtue of the prospective nature of its ruling, is res judicata as to Tampa Crown.

REVERSED and REMANDED with directions that judgment be entered for the Division.

WOLF and KAHN, JJ., concur.

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

October 31, 1994

CASE NO: 93-01703

L.T. CASE NO. 92-1200

Division of Alcoholic-Beverages and Tobacco v. McKesson Corporation, et al.

Appellants(s), Appellee(s).

BY ORDER OF THE COURT:

Motion for rehearing, filed September 22, 1994, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/ Jon S. Wheeler
JON S. WHEELER, [seal]
CLERK

By: Sondra Joyner
Deputy Clerk

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Supreme Court of the United States

No. A-527

Tampa Crown Distributors, Inc.,

Petitioner

v.

Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including March 1, 1995.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme Court of the United States

Dated this 19th day of January, 1995.